

2011 WL 10677691 (Ariz.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Arizona.
Pima County

Ernest H. BLACKBURN, Personal Representative of the Estate of Billie
Jo Blackburn, on behalf of the Estate of Billie Jo Blackburn, Plaintiff,

v.

ENSIGN SABINO, L.L.C., a Nevada limited liability company doing business as Sabino Canyon Rehabilitation and Care Center; Bandera Healthcare, Inc., a California corporation; the Ensign Group, Inc., a Delaware corporation; Ensign Facility Services, Inc., a Nevada corporation; Christine Jones, Administrator; Cornerstone Hospital of Southeast Arizona, L.L.C., a Delaware limited liability company; CS Healthcare Arizona, L.L.C., a Delaware limited liability company; Cornerstone Healthcare Group Holding, Inc., a Delaware corporation, Christine Hansen, Chief Executive Officer/Administrator and John Does 1-250;, Defendants.

No. C20101401.
September 19, 2011.

(Oral Argument Requested)
(Court Reporter Requested)

**Plaintiff's Response to Defendants Bandera Healthcare, Inc., the Ensign Group,
Inc., and Ensign Facility Services, Inc.'s Motion for Summary Judgment**

Wilkes & McHugh, P.A., [Melanie L. Bossie](#), #022825, [Mary Ellen Spiece](#), #011058, 2355 E. Camelback, Road, Suite 910, Phoenix, AZ 85016, Telephone: (602) 553-4552, Facsimile: (602) 553-4557, arzminuteentry@wilkesmchugh.com, Attorneys for Plaintiff.

(Assigned to the Honorable Scott Rash).

Plaintiff submits his response to Defendants Bandera Healthcare, Inc., The Ensign Group Inc. and Ensign Facility Services, Inc.'s motion for summary judgment. Plaintiff's response is supported by the following memorandum of points and authorities, as well as by Plaintiffs concurrently filed response to statement of facts ("RSOF") and Plaintiffs separate statement of facts ("PSOF"). For all the reasons discussed herein, the court should deny Defendants' motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

Billie Jo Blackburn was 68 years old and had a history of [hypertension](#), [peripheral vascular disease](#) and [chronic obstructive pulmonary disease](#). PSOF ¶ 2. Prior to her admission to Sabino Canyon, Mrs. Blackburn had been admitted to Tucson Medical Center with altered medical state. She subsequently suffered an intracranial bleed. Mrs. Blackburn remained a patient at Tucson Medical Center until March 5, 2008. PSOF ¶ 2. Ms. Blackburn was admitted to Sabino Canyon on March 5, 2008, for nursing and rehabilitation services. PSOF ¶ 3. Upon admission Mrs. Blackburn was unable to ambulate and was non-verbal; was dependent upon the facility staff for all of her activities of daily living; and was able to consume small amounts of food orally but received nutrition primarily through a percutaneous endoscopic [gastrostomy](#) (PEG) tube. PSOF ¶ 3. Nursing staff was aware of Ms. Blackburns presenting medical conditions, as well as her compromised physical state and knew or should have known that she was dependent on the staff for her activities of daily living, as well as for her overall health, safety and well-being. PSOF ¶ 4.

On March 6, 2008, Ms. Blackburn's chart noted that she had a 1cm x 1.4cm Stage II [pressure sore](#) to her coccyx. By March 27, 2008, this wound was noted to be 1 cm x 1 cm in size. On April 4, 2008, Ms. Blackburn was transferred from Sabino Canyon via ambulance to Tucson Medical Center where she was found to be suffering from respiratory distress and sepsis secondary to a [urinary tract infection](#). On April 5, 2008, Ms. Blackburn was seen in consultation by the wound care nurse. At that time, she was noted to have a dark red area to her coccyx that was 12 cm x 9 cm with two open areas that were 1.25cm by 1.25 cm in size. On April 17, 2008, Ms. Blackburn was discharged from Tucson Medical Center and was admitted to Cornerstone Hospital for continued nursing services and rehabilitation. PSOF ¶¶ 7 - 10.

Throughout her residency at Sabino Canyon, the nursing staff was well aware of Ms. Blackburn's risk for the development and worsening of [pressure sores](#). In fact she was assessed as being at high risk for skin breakdown. PSOF ¶ 11. Nevertheless, inadequate interventions were put in place to prevent the worsening of Ms. Blackburn's [pressure sore](#) to her coccyx. PSOF ¶ 11. For example, the facility staff did not provide adequate turning and repositioning to Mrs. Blackburn even though the standard of care required that she should have been turned and repositioned every two hours in order to keep pressure off wounds and allow them to heal. PSOF ¶¶ 12, 13.

The nursing staff at Sabino Canyon also failed to consistently follow physician's orders with respect to treatments for her [pressure ulcer](#) to her coccyx. PSOF ¶ 14. Sabino Canyon also failed to provide Billie Jo Blackburn with the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being in accordance with her assessments and care plans, as well as failed to provide her with sufficiently trained nursing personnel in order for them to provide her with adequate nursing and related services. PSOF ¶ 15. Moreover, the staff failed to ensure that Ms. Blackburn received adequate nutrition as evidenced by various laboratory reports indicating that she had low albumin and total protein. PSOF ¶ 16.

The conduct of the staff at Sabino Canyon Rehabilitation and Care Center in failing to implement appropriate interventions to prevent the development and worsening of [pressure sores](#), in failing to take appropriate measures to promote the healing of [pressure sores](#) and in failing to prevent malnutrition were all violations of the standard of care and caused Ms. Blackburn unnecessary pain and suffering. PSOF ¶¶ 18, 19. The acts and omissions by the hospital and nursing home's staffs constituted [abuse](#) and neglect as defined in the Arizona Adult Protective Services Act. PSOF ¶ 20.

II. CORPORATE CONTROL

Bandera Healthcare, Inc., The Ensign Group, Inc., Ensign Facility Services, Inc. and Sabino Canyon Rehabilitation and Care Center (and numerous other similar facilities) are all essentially one and the same. This is so because, despite the deliberate corporate maze, The Ensign Group is the ultimate owner of Sabino Canyon Rehabilitation and Care Center, and The Ensign Group, Ensign Facility Services, and Bandera Healthcare, Inc., are involved in the operation and management of Ensign facilities, including the Sabino Canyon. See, e.g. PSOF ¶¶ 29, 31 - 40, 62, 66 * 69, 72, 74, 103, 104. The various entities in The Ensign Group corporate structure share the same address, and The Ensign Group representatives sign documents on behalf of each. PSOF ¶¶ 105 - 107. The Ensign Group benefits from the operation of Ensign Group facilities, including Sabino Canyon Rehabilitation and Care Center, by being entitled to the profits of the facility. PSOF ¶¶ 27, 28.

Furthermore, The Ensign Group, Inc., as a publicly traded entity, informs its investors and prospective investors that it "is a provider of skilled nursing and rehabilitative care services" through its operation of facilities in Arizona, such as Sabino Canyon Rehabilitation and Care Center and 61 facilities in six different states. PSOF ¶¶ 22, 23. The Ensign Group also informs the public that 97% of its revenue is generated through its skilled nursing services and integrated rehabilitative therapy services. PSOF ¶ 93. This revenue can fluctuate depending upon the percentage of high acuity patients who require a high level of skilled nursing within their long-term care facilities. PSOF ¶¶ 98, 99. The Ensign Group also informs its investors and potential investors that successful litigation concerning the care of a resident at a nursing home, such as Sabino Canyon Rehabilitation and Care Center, may adversely affect The Ensign Group Inc.'s financial condition. PSOF ¶ 101.

III. SUMMARY JUDGMENT IS IMPROPER

Defendants, as the moving party, have the burden in connection with their summary judgment motion. See *Villas at Hidden Lakes Condominiums Ass'n v. Geupel Const. Co., Inc.*, 174 Ariz. 72, 81, 847 P.2d 117, 126 (App. 1992) citing *Nelson v. Cannon*, 126 Ariz. 381, 385, 616 P.2d 56, 60 (App.1980) (“The initial burden of establishing the elements of summary judgment rests with the moving party.”) Moreover, summary judgment “is not a substitute for trial” and “litigants are entitled to the right of trial where there is the slightest doubt as to the facts.” *Peterson v. Valley Nat'l Bank*, 90 Ariz. 361, 362, 368 P.2d 317, 318 (1962). Moreover, the court must review the facts in light most favorable to the non-moving party, that is, Plaintiff herein. See *Andrews v. Blake*, 205 Ariz. 236, 240, 69 P.3d 7, 11 (2003). Motions for summary judgment should only be granted if the facts produced in support of the claim or defenses “have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense.” *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

The efforts of Defendants Bandera Healthcare, Inc., The Ensign Group, Inc., and Ensign Facility Services, Inc. to distance themselves from the direction, management and/or control of Sabino Canyon Rehabilitation and Care Center fail as a result of voluminous documentary evidence and testimony of Defendants' representatives. For instance, The Ensign Group, Inc. holds itself out as a provider of nursing services at facilities such as Sabino Canyon Rehabilitation and Care Center when attempting to lure individuals to invest their funds in The Ensign Group. PSOF ¶¶ 22, 23, 37. However, when it comes to taking responsibility for the same services from which they derive revenue and profits, Bandera Healthcare, Inc., The Ensign Group and Ensign Facility Services claim ignorance and deny engaging in those same functions. Either Bandera Healthcare, Inc., The Ensign Group and Ensign Facility Services control, govern, and/or operate nursing homes or they do not. However, they should not be allowed to have it both ways: reap the financial rewards of the skilled nursing industry but then be protected by a fictional shelter in order to avoid responsibility for conduct which generates \$358.6 million in revenue. PSOF ¶ 94. For the reasons stated herein, summary judgment should be denied.

IV. LEGAL ARGUMENT

A. THE CORPORATE DEFENDANTS CAN BE HELD LIABLE

The Corporate Defendants contend that they cannot be liable for **abuse** because they did not provide care to Ms. Blackburn. See Defendants' Motion at pp. 4-5. For the reasons stated herein, and as contained in Plaintiff's responsive statement of facts and Plaintiff's separate statement of facts filed concurrently, the Corporate Defendants can be, and should be, held liable in this case.

1. Direct Liability

In *Corbett v. Manor Care of America*, 213 Ariz. 618, 146 P.2d 1027 (App. 2006), one issue before the court was whether the scope of liability under APSA was limited to employees who had a direct caregiver-patient relationship with the patient. The defendant employees in *Corbett* argued that A.R.S. § 46-455 requires a direct caregiver-patient relationship for a duty to arise. However, the court found that reliance on the “proposition that APSA requires a direct caregiver-patient relationship is misplaced.” 213 Ariz. at 628, 146 P.2d at 1037. The court further explained that “statutory language controls our interpretation when the language is clear and unequivocal.” 213 Ariz. at 629, 146P.2d at 1038, (citing *Mercy Healthcare Arizona, Inc. v. Arizona Health Care Cost Containment Sys.*, 181 Ariz. 95, 98, 887 P.2d 625, 628 (Ct. App. 1994)).

The Corbett court went on to explain that “[u]nder the plain wording of the statute, an incapacitated or vulnerable adult can bring a lawsuit against ‘any person or enterprise’ that ‘has been employed to provide care’ or that ‘has assumed a legal duty to provide care’ if the person or enterprise has ‘caused or permitted’ the incapacitated or vulnerable adult to be **abused**, neglected, or exploited.” 213 Ariz. at 629, 146P.2d at 1038 (citing A.R.S. § 46-45(B)). Accordingly, the Corbett court ultimately held:

....that the legislature did not intend to limit liability to those who have a direct caregiver-patient relationship with an incapacitated or vulnerable adult. The statute subjects to liability both persons and enterprises, not just individuals. Furthermore, the statute subjects to liability those who cause or *permit* the **abuse**, neglect, or exploitation of an incapacitated or vulnerable adult.

213 Ariz. at 629, 146 P.2d at 1038 (emphasis in original). Thus, direct care responsibilities are not required to hold one liable for harm suffered by a patient.

The Arizona Court of Appeals recently reiterated that a direct care relationship is not necessary for liability under APSA. In *Estate of Braden v. State*, 225 Ariz. 391, 238 P.3d 1265 (Ct. App. 2010), a developmentally disabled adult died due to injuries suffered while a resident at a facility under a contract with the State of Arizona. The court held that the victim's estate was entitled to bring an action against the state for **abuse** or neglect under APSA. The court concluded that the State of Arizona, although not in a direct care-giving relationship, “provided care” to the disabled adult and “assumed a legal duty” to provide care, thereby subjecting it to potential liability.

Here, Plaintiff has alleged that the Corporate Defendants caused or permitted Ms. Blackburn to be subjected to **abuse**, neglect and exploitation. The Corporate Defendants' various claims disputing their role and involvement in the operations of Sabino Canyon Rehabilitation and Care Center, specifically that they did not assume responsibility for providing or rendering care to residents such as Ms. Blackburn, are directly contradicted by the evidence in this case. Extensive evidence exists which establishes the Corporate Defendants' ownership, involvement, management, and control of Sabino Canyon Rehabilitation and Care Center which necessarily involves the provision of care and medical treatment to the facility's residents.

As stated, Ensign Group represents itself as a provider of skilled nursing and rehabilitation care services through the operation of facilities in Arizona which includes the Sabino Canyon facility. PSOF ¶ 22. Ensign Group claims to provide a broad spectrum of skilled nursing and assisted living services including physical, occupational and speech therapies and other rehabilitative and healthcare services. PSOF ¶ 23. Ensign Group declares that it has “achieved a reputation for high-quality and cost-effective care and services of our patients and residents within the communities we serve....” PSOF ¶ 63. The Ensign Group, Inc.'s website states that “The Ensign Group, Inc. is a place where residents and their families feel loved, informed, and comfortable. By creating an empowered, professional work environment, our employees are free to meet our customers' needs every day. The Ensign Group, Inc. experience renews our residents' health and hopes for the future by providing a surprising level of attention and service. It is our pleasure to serve each other and our residents.” PSOF ¶ 40. Ensign Group even promises that “everyone, everywhere, all the time, shows their care for the residents.” PSOF ¶ 39. And, significantly, the operating agreement between Ensign Sabino LLC (which does business as Sabino Canyon Rehabilitation and Care Center) and the Ensign Group grants Ensign ultimate control, including to make essentially all decisions related to the facility. PSOF ¶¶ 103, 104.

As for Ensign Facility Services, it is a 100% owned subsidiary of Ensign Group, Inc. Ensign Group, Inc. is a holding company that owns various businesses, including Ensign Facility Services, Inc. and nursing homes. PSOF ¶¶ 21, 25. Services which Ensign Facility Services provides include accounting, payroll, information systems, human resources, legal and compliance consulting services. PSOF ¶ 26. Ensign Facility Services receives income for providing services to skilled nursing facilities and any profit goes to Ensign Group, Inc. PSOF ¶ 27. Christopher Christensen is on the board of directors of Ensign Facility Services and is president and CEO of Ensign Group, Inc. PSOF ¶¶ 42.

With respect to Bandera, the Arizona Department of Health Services Renewal Application for a Health Care Institution License for Sabino Canyon Rehabilitation and Care Center lists Ensign Sabino, LLC as the owner of the facility and Bandera Healthcare, Inc. as the sole member and manager. PSOF ¶ 34. Mike Dalton is the main resource person at Bandera for Sabino Canyon. PSOF ¶ 48. Mr. Dalton reported to Christopher Christensen, who is the president of The Ensign Group, Inc. PSOF ¶ 47. Mr. Dalton is also the direct supervisor of Sabino Canyon's administrator and Mr. Dalton's e-mail address is mdalton @ensigngroup.net. PSOF ¶¶ 49, 50. The governing body of Sabino Canyon Rehabilitation and Care Center consists of the following: administrator

Christine Jones and Mike Dalton. PSOF ¶55. Individuals who are appointed to the governing body of a skilled nursing facility are responsible for making sure that quality standards are upheld and making sure that compliance is what it ought to be and that objectives of the particular entity are achieved from a qualitative and compliance standpoint. PSOF ¶¶ 56,57. Moreover, Sabino Canyon's former director of nursing, Maya Castillo, received orientation from individuals who work for Bandera Healthcare. PSOF ¶ 53.

Further, as mentioned, the Ensign Group, Inc.; Ensign Facility Services, Inc.; and Bandera Healthcare, Inc. (along with a number of other Ensign entities) all have the same address. PSOF ¶ 29. Thus, it is not difficult to see that despite the multitude of entities in play, the reality is that they are, in fact, all under the same Ensign Group umbrella which is in the business of operating skilled nursing facilities and, in fact, operates Sabino Canyon Rehabilitation and Care Center. As such, the Corporate Defendants cannot distance themselves from the operation of the Sabino Canyon. Rather, due to their involvement with, and control and operation of, their facilities, they assumed a legal duty to provide care to residents and, in turn, can be liable for causing and/or permitting the **abuse** and neglect of their residents, including Ms. Blackburn.

2. Vicarious Liability

In addition to direct liability, corporate entities may be vicariously liable for the negligent or tortious acts of their employees committed within the course and scope of their employment. See *Baker ex. rel. Hall Brake Supply, Inc. v. Stewart*, 197 Ariz. 535, 540, 5 P.3d 249, 254 (Ct. App. 2000). Thus, Plaintiff must establish that the Ensign/Sabino Canyon employees were acting within the course and scope of their employment with respect to their treatment of Ms. Blackburn. An employee's conduct falls within the scope of their employment if it is the kind the employee is employed to perform, it occurs within the authorized time and space limits, and furthers the employee's business even if the employer has expressly forbidden it." 197 Ariz. at 540, 5 P.3d at 254.

The employees of Sabino Canyon are included in the Ensign Group's workforce. The Ensign Group, Inc.'s Form 10-K annual report for the year ended December 31, 2009 includes that "the operation of our skilled nursing and assisted living facilities requires a large number of highly skilled healthcare professionals and support staff. At December 31, 2009, we had approximately 7,718 full-time equivalent employees..." "We continue to maintain our right to inform our employees about our view of the potential impact of unionization upon the workplace generally and upon individual employees..." "Our cost of services represents the costs of operating our facilities and primarily consists of payroll and related benefits, supplies, purchased services, and ancillary expenses..." "The Company has a 401(k) defined contribution plan (the 401(k) Plan), whereby eligible employees may contribute up to 15% of their annual basic earnings. Additionally, the 401(k) Plan provides for discretionary matching contributions (as defined) by the Company's PSOF ¶¶ 75 80. Ensign's workforce, which it declares is 7,718 strong, obviously includes the personnel who staff the facilities, including Sabino Canyon.

Moreover, the Corporate entities are involved in hiring and training employees for their facilities. In fact, Ensign contends that it continues "to recruit, hire, train and incentivize" the best caregivers in the healthcare industry. PSOF ¶ 38,81. Ensign Group's website recruits personnel for its facilities, stating: "...Nurses, clinicians, therapists, and other medical professionals in the senior care field that not only love what they do, but feel it is their calling - you're the ones we want to hear from!..." PSOF ¶ 38. In connection with its hiring endeavors, Ensign Group's wholly owned subsidiary, Ensign Facility Services, has posted for the positions of therapy compliance specialist and director of human resources, with applicants directed to submit their inquiries to *cdominuez@ensiroup.net*. PSOF ¶¶ 85 - 91. Also, Mr. Christensen (president and CEO of Ensign Group and Board member of Ensign Facility Services) is responsible for hiring most of the administrators for the nursing homes and assisted living facilities owned by The Ensign Group and those administrators have Ensign Group e-mail addresses. PSOF ¶¶ 42 -45,50,51.

The conduct of the Sabino Canyon staff certainly fell within the scope of their employment since they were hired to provide care and treatment to the facility's patients, including Ms. Blackburn. The nursing home was aware that Ms. Blackburn was a vulnerable adult with impairments and limitations. PSOF ¶¶ 1, 4, 11. Yet, during the course of their employment and in connection with their provision of care and supervision—or lack thereof—Sabino Canyon personnel negligently failed to

provide the care, treatment, and interventions essential to Ms. Blackburn's health and wellbeing. PSOF ¶¶ 13 - 20. Pursuant to the doctrine of respondeat superior, the Corporate Defendants can be held liable for the negligence of Sabino Canyon employees which caused Ms. Blackburn's injuries.

3. Piercing the Corporate Veil

Because Plaintiff has established that the Corporate Defendants, particularly The Ensign Group, can be directly and vicariously liable for the negligent acts and omissions which led to Ms. Blackburn's injuries and pain and suffering, the court does not need to reach the issue of piercing the corporate veil in this case. However, sufficient evidence does exist to warrant piercing the thin corporate veil behind which the Corporate Defendants are attempting to hide.

A parent corporation may, pursuant to an alter ego theory, be held liable for the acts of its subsidiary “when the individuality or separateness of the subsidiary corporation has ceased.” See *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. 34, 37, 821 P.2d 725, 728 (1991). See also *Pan Pacific Sash and Door Co., v. Greendale Park, Inc.* 166 Cal.App.2d 652, 333 P.2d 802 (1958) (“Where injustice would result from a strict adherence to the doctrine of separate corporate existence, a court will look behind the corporate structure to determine the identity of the party who should be charged with a corporation's liability... Since the separate personality of a corporation is but a statutory privilege it must not be employed as a cloak for the evasion of obligations.”); *Los Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App.3d 1220, 1249, 1 Cal. Rptr. 2d 301 (1991) (“A very numerous and growing class of cases where the corporate entity is disregarded is that wherein it is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation... it would be unjust to permit those who control companies to treat them as a single or unitary enterprise and then assert their corporate separateness in order to commit frauds and other misdeeds with impunity.” [emphasis in original]).

In order to prevail under an alter ego theory, a plaintiff must prove unity of control and that observance of the corporate form would endorse a fraud or result in injustice. *Gatecliff v. Great Republic Life Ins. Co.*, 170 Ariz. at 37, 821 P.2d at 728. Factors which may suggest substantially total control include, among other things:

Stock ownership by the parent; common officers or directors; financing of subsidiary by the parent; payment of salaries and other expenses of subsidiary by the parent; failure of subsidiary to maintain formalities of separate corporate existence; similarity of logo; and plaintiff's lack of knowledge of subsidiary's separate corporate existence.

170 Ariz. at 37, 821 P.2d at 728. A number of those factors exist with respect to The Ensign Group, Inc. and North Mountain Medical and Rehabilitation Center.

The evidence indisputably demonstrates the Corporate Defendants' operational involvement, management, direction and control of Sabino Canyon. For instance, when the terms “Ensign”, “we”, “us” and “our”, are referred to within The Ensign Group, Inc.'s Prospectus, it refers to The Ensign Group, Inc. and its subsidiaries. PSOF ¶ 62. The Ensign Group, Inc. portrays itself as a provider of skilled nursing and rehabilitative care services through the operation of facilities in Arizona and, as of December 31, 2009, owned or leased 79 facilities in seven different states. PSOF ¶¶ 22, 64. The Ensign Group, Inc. claims to provide a broad spectrum of skilled nursing and assisted living services, physical, occupation and speech therapies, and other healthcare services for both long term and short stay patients. PSOF ¶ 23. The Ensign Group, Inc.'s website represents that it is the owner of a number of facilities in Arizona, including Sabino Canyon as one of its facilities located in Tucson, Arizona. PSOF ¶ 37.

The various entities also share common officers and directors who are involved in the decision making and operation of the facilities. Christopher Christensen, president and CEO of The Ensign Group and Ensign Facility Services board member, hires the facility administrators and regularly visits the facilities. PSOF ¶¶ 42 - 45. Mike Dalton, president/CEO of Bandera, directly reports to Christopher Christensen, is the supervisor of Sabino Canyon's administrator, and serves on Sabino Canyon's governing

board. PSOF ¶¶ 47 - 50, 55 - 57, 112. Gregory K. Stapley similarly wears multiple hats, including secretary of the Ensign Group; president of Ensign Facility Services; and director positions with Bandera Healthcare and the Flagstone Group and he signs documents on behalf of all the various entities. PSOF ¶¶ 105, 111. Beverly Wittekind holds the secretary positions with Ensign Facility Services, Bandera and Flagstone Group and is also the treasurer of Ensign Facility Services; and Soon Burnam is the treasurer of Bandera Healthcare and The Flagstone Group. PSOF ¶¶ 113, 114. And, as mentioned, the various entities all share the same address. PSOF ¶¶ 29, 106, 107, 109.

Furthermore, revenues generated by its skilled nursing facilities provide a tidy profit for Ensign. Indeed, ninety-seven percent (97%) of The Ensign Group, Inc.'s revenue, from end of year December 31, 2006 and six months ending June 30, 2007, was generated through its skilled nursing services including its integrated rehabilitative therapy services. PSOF ¶ 93. The Ensign Group, Inc. increased its revenue from \$02.1M in 2002, to \$358.6M in 2006 and, during this same time period, increased its net income from \$3.6M in 2002 to \$22.5M in 2006. PSOF ¶ 94. On May 5, 2010, The Ensign Group reported a record quarter, with a first quarter 2010 adjusted earnings of \$0.45 per share. PSOF ¶ 95. In short, if nursing homes or assisted living facilities which are owned by The Ensign Group make money, the profit belongs to The Ensign Group. PSOF ¶¶ 27, 28. Conversely, profits may be negatively affected by unsuccessful litigation involving the Ensign Group's subsidiaries. PSOF ¶ 101.

Thus, contrary to their representations, the Corporate Defendants engage in the direction and/or control of their facilities and facility employees, and are inextricably interwoven with their facilities, including Sabino Canyon Rehabilitation and Care Center. Plaintiff has also demonstrated that The Ensign Group, Inc. executives, who wear multiple hats in the various entities, are the decision-makers who exercise control over the facility and who are ultimately at the helm of the operations. Therefore, The Ensign Corporate Defendants have clearly assumed responsibility for providing care to residents at its facilities, including residents at Sabino Canyon, including Ms. Blackburn. Moreover, injustice will certainly result to residents of Sabino Canyon, including Ms. Blackburn, if the Corporate Defendants allow their facilities and employees to engage in negligence, neglect and **abuse** of residents yet escape liability for such negligence, neglect and **abuse**, while still profiting from the operation of those very facilities. Accordingly, Plaintiff has established that Corporate Defendants should be subject to liability under the alter ego theory.

B. THE CORPORATE DEFENDANTS OWED A DUTY TO MS. BLACKBURN.

The Corporate Defendants argue that, because they owed no duty to Ms. Blackburn, they cannot be held liable for the torts committed against her. See Defendants' Motion at pp. 5-6. However, as established above, the Corporate Defendants manage, direct, and control Sabino Canyon and, therefore, controlled the delivery of care to Ms. Blackburn. Having assumed that role, the Corporate Defendants owed a duty to her. See *Estate of Braden v. State*, 225 Ariz. 391, 238 P.3d 1265 (Ct. App. 2010) (although not in direct care-giving role, the state assumed a legal duty to provide care to developmentally disabled adult and thus could be civilly liable under APSA). Thus, the Corporate Defendants may not hide behind an illusory corporate veil in order to evade responsibility by arguing the absence of a duty to residents. See *supra Pan Pacific Sash and Door Co., v. Greendale Park, Inc.*, 166 Cal.App.2d 652, 333 P.2d 802 (1958); *Los Palmas Assocs. v. Las Palmas Ctr. Assocs.*, 235 Cal. App.3d 1220, 1249, 1 Cal. Rptr. 2d 301 (1991).

Further, when entities employ the individuals who provide care to vulnerable adults such as Ms. Blackburn, control the finances of the facility, and make decisions concerning the management of the facility within which Ms. Blackburn resided, those entities are liable for the injuries suffered by such residents. See, e.g., *Corbett v. ManorCare of America, Inc.*, 213 Ariz. 618, 146 P.3d 1027 (2006). Here, there is no individuality or separateness among and between the various Corporate Defendants and the Sabino Canyon facility. The corporate entities control the governance of Sabino Canyon and ultimately own, control, and direct the business affairs of the facility and reap the financial rewards as result thereof. PSOF ¶¶ 27, 28, 93 - 95, 103, 104.

As such, adhering to the fiction that there is a separate existence between and among Sabino Canyon Rehabilitation and Care Center and the Corporate Defendants would promote a fraud and result in injustice because residents such as Ms. Blackburn who have been neglected and/or **abused** while at Ensign facilities will be prevented from being adequately and fairly compensated.¹

Therefore, the Corporate Defendants must be included in this litigation. See *supra Pan Pacific Sash and Door Co., v. Greendale Park, Inc.* 166 Cal.App.2d 652, 333 P.2d 802(1958); *Los Palmas Assocs. v. Las Palmas Cir. Assocs.* 235 Cal. App.3d 1220, 1249, 1 Cal. Rptr. 2d 301 1991

C. PLAINTIFF'S EXPERT TESTIMONY SUPPORTS THE CLAIMS AGAINST THE CORPORATE DEFENDANTS.

Defendants incorrectly assert that this case “is premised upon alleged medical negligence,” thereby requiring expert testimony. See Defendants' Motion at pp. 6-7. For clarification, Plaintiff has not brought a medical negligence action pursuant to [A.R.S. § 12-561 et seq.](#) Rather, this matter is based on violation of the Arizona Adult Protective Services Act (APSA), [A.R.S. § 46-451 et seq.](#) and wrongful death. Thus, Plaintiff does not need expert testimony pursuant to [A.R.S. § 12-2604](#) (which addresses expert qualifications and opinions in the medical negligence context. Regardless, Plaintiff's experts' opinions, together with the wealth of evidence establishing the interrelationship among and between the Corporate Defendants and the Sabino Canyon facility, are sufficient to hold the Corporate Entities liable for Ms. Blackburn's injuries sustained while she was a resident of Sabino Canyon.

The Corporate Defendants apparently believe that unless Plaintiff's experts expressly mention them by name, they cannot be held liable. See Defendants' Motion at pp. 6-7. The court should reject the Corporate Defendants' simplistic view. While Plaintiff's experts' opinions are stated in terms of the facility and/or its employees, as discussed above, the Corporate Defendants are all essentially one and the same and employ the individuals who neglected Ms. Blackburn. As such, the opinions of Plaintiff's experts against the facility inure to the Corporate Defendants by reason of their intimate association with and role in, the operation of the facility.

D. PLAINTIFF HAS ESTABLISHED A CAUSAL CONNECTION BETWEEN THE CORPORATE DEFENDANTS AND MS. BLACKBURN'S INJURIES.

Plaintiff has established a sufficient causal connection between the Corporate Defendants and Ms. Blackburn's injuries. The Revised Arizona Jury Instructions (Civil) 4th Fault 2, Definition of Causation defines causation as follows: “negligence causes an injury if it helps produce the injury and if the injury would not have happened without the negligence.” The role of the Corporate Defendants in the operation and oversight of the Sabino Canyon facility provide a sufficient causal connection between the negligence at Ensign's Sabino Canyon facility and the injuries to Ms. Blackburn. As demonstrated, the Corporate entities are involved in the management, control and operation of Sabino Canyon in exchange for which they receive revenue and profits. PSOF ¶¶ 76, 93 - 98, 102 - 104. To the extent that the conduct of Sabino Canyon caused injury, a causal connection exists with respect to the Corporate Defendants.

In addition, contrary to Defendants' assertion, and as Plaintiff has abundantly established, the Corporate Defendants do, indeed, have a hand in hiring, training, evaluating and supervising nurses, caregivers and employees at Sabino Canyon. PSOF ¶¶ 75 - 77, 80 - 92. For example, the Ensign Group, Inc. asserts that it recruits, hires, and trains the best leaders and caregivers in the healthcare industry and that its “success depends upon our ability to retain and attract nurses, Certified Nurse Assistants (“CNAs”) and therapists. Our success also depends upon our ability to retain and attract skilled management personnel who are responsible for the day-to-day operations of each of our facilities...” PSOF ¶¶ 81, 82. Christopher Christensen, president and CEO of The Ensign Group, Inc. and board member of Ensign Facility Services, hires most of the administrators for the nursing homes and assisted living facilities owned by The Ensign Group, Inc. PSOF ¶¶ 42 - 45. And The Ensign Group, Inc. promotes that it has a “company-wide commitment to ongoing education, training and professional development...” related to the more than 7,000 employees in its workforce. PSOF ¶ 92. Also as established above, Ensign Facility Services and Bandera are interwoven with Sabino Canyon and have roles in relation to the employees at that facility and, in turn, the care rendered to residents.

The interrelationship between and among the Corporate Defendants and Sabino Canyon Rehabilitation and Care Center is indisputable. Because the requisite causal connection exists between the acts and omissions by the Corporate Defendants in connection with their ownership, control, management and operation of the Sabino Canyon facility in Tucson, Arizona, as well as their training and supervision - or lack thereof-of their employees, and the injuries, pain and suffering of Ms. Blackburn, Plaintiffs claims against the Corporate Defendants are appropriate.

V. CONCLUSION

Due to their association with, and ownership, management and control of, Sabino Canyon Rehabilitation and Care Center, the Corporate entities are proper Defendants in this matter. Therefore, Plaintiff requests the court deny summary judgment.

RESPECTFULLY SUBMITTED this 16th day of September, 2011.

WILKES & McHUGH, P.A.

By:

Mary Ellen Spicce

Attorneys for Plaintiff

Footnotes

- 1 In September, 2010, The United States Government Accountability Office (GAO) prepared a report to Congressional Requesters regarding "Nursing Homes - Complexity of Private Investment Purchases Demonstrates Need for CMS to Improve the Usability and Completeness of Ownership Data." GAO's recommendations included that "the Secretary of HHS and CMS Administrator consider requiring the reporting of certain information to make nursing home ownership structures more understandable and take other actions to improve the accuracy and dissemination of these data as HHS implements new ownership reporting requirements in the 2010 Patient Protection and Affordable Care Act." PSOF ¶¶115, 116. Also, as part of President Obama's healthcare reform, he signed into law Senate Bill 647, the "Nursing Home Transparency and Improvement Act of 2009." The Act included corporate disclosure requirements because "[t]he nursing home industry has changed dramatically in the 21 years since enactment of the Nursing Home Reform Act of 1987, with real estate asset holdings frequently separated from operations in a manner that can frustrate efforts by regulators to hold parent companies accountable for the quality of services that are provided in their facilities." In the near future, the United States Supreme Court will likely be determining the constitutionality of the Act. Regardless, the recognition of the need for GAO investigations and legislation such as SB647 problems related to convoluted